labor practice proceeding (A. 3–13) are reported at 172 NLRB No. 77. The Board's earlier decision and determination of dispute (A. 13–25) are reported at 167 NLRB 185.

JURISDICTION

The judgment of the court of appeals (A. 398–399) was entered on June 30, 1970. The Board's timely petition for rehearing *en banc* was denied on October 1, 1970 (A. 400–401). The petition for a writ of certiorari in No. 1184 was filed on December 30, 1970, and that in No. 1231 on January 13, 1971. The petitions were granted on March 22, 1971 (A. 402). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board has power to determine a jurisdictional dispute under Section 10(k) of the National Labor Relations Act where the competing unions have agreed upon a voluntary method of adjustment, but the employer involved has not consented to be bound by that procedure.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> 4(i) to engage in, or to induce or encourage any individual employed by any person * * * to engage in, a strike or a refusal in the course of his employment to * * * work on any goods,

articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person * * * where in either case an object thereof is:

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * * *

Sec. 10. * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) * * *, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The relevant provisions of the Board's Rules and Regulations (29 CFR 102.1, *et seq.*) are set forth in the Appendix, *infra*, pp. 37–40.

STATEMENT

A. THE UNDERLYING DISPUTES

This case involves picketing by the Plasterers Union ("Plasterers")[1] directed against two different employers—Texas State Tile & Terrazzo Company ("Texas State") and Martini Tile and Terrazzo Company ("Martini")—in furtherance of its demand that the work of applying a coat of Portland cement mortar to walls upon which tile was to be installed should be assigned to employees represented by Plasterers rather than to employees represented by the Tile Setters Union ("Tile Setters").[2]

1. The Anderson library job

In 1965, Southwestern Construction Company ("Southwestern"), a general contractor, entered into a contract with the University of Houston to construct an addition to the University's library. The tile and terrazzo work was subcontracted to Texas State, which commenced work in August 1966. (A. 15; 27–28, 36.) Texas State assigned the tile work to employees represented by Tile Setters, the union with which it had a collective bargaining agreement (A. 15–20; 28, 42, 47, 346–347). This work, which was done after employees represented by Plasterers had applied a thin scratch coat of cement over the metal lath, consisted of applying a second coat of Portland cement mortar and then tile to the stairwells and the

[1] Plasters' Local Union No. 79, Operative Plasterers' and Cement Masons' International Association, AFL–CIO.

[2] Tile, Terrazzo and Marble Setters Local Union No. 20, Bricklayers, Masons and Plasterers International Union of America, AFL–CIO.

walls of the restrooms of the eight-story library building (A. 16; 29–31, 37–38, 48, 150, 355).

During the fall of 1966, Plasterers advised Tile Setters that the application of the second coat was the work of Plasterers (A. 15; 40–41, 44, 47, 49–53, 356).[3] Tile Setters rejected this claim, whereupon Plasterers submitted the matter to the National Joint Board for the Settlement of Jurisdictional Disputes ("Joint Board"), a tribunal established by the Building Trades Department, AFL–CIO, and certain employer groups (A. 15; 52–53, 306, 322–323; see also 299–303). Both unions are bound by decisions of the Joint Board by virtue of their affiliation with International Unions who were members of the Building Trades Department; however, neither Texas State, the employer who assigned the disputed work, nor the local or national contractors' associations to which Texas State belonged, had agreed to be bound by the procedures

[3] As the court below pointed out (A. 363–364):

"The focus of these jurisdictional disputes can be traced to the development in the mid-1950's of the thin-set or adhesive method of applying tile. Previously it was necessary to set tile in a bed of wet plaster so that moisture would not be absorbed from the bonding agent before it hardened and formed a firm bond. The application of this setting bed or float coat was the work of tile setters. The thin-set method, on the other hand, employed new bonding agents which made it possible to apply tile directly to a smooth surface of dry plaster on a thin coat of dry-set mortar. The Tile Setters contended that they should prepare this smooth plaster surface just as they had prepared the wet setting bed. The Plasterers took the position that the tile setter was only entitled to apply his setting bed and that in the thin-set method it was the dry-set mortar and not the smooth and dry plaster surface which constituted the setting bed."

of the Joint Board (A. 8, 22; 43–44, 46–47, 55, 179–180, 302–303).

The competing unions presented their respective positions to the Joint Board, but Texas State informed the Joint Board that it did not wish to submit the dispute to it (A. 308–309, 322-326, 328–329). On November 9, 1966, the Joint Board awarded the disputed work to Plasterers (A. 15–16; 315–316). Thereafter, Plasterers made several attempts to obtain the work, but Texas State refused to accede to its demands, and assigned the work to Tile Setters (A. 6, 16; 54–55, 180–181, 307, 328–329, 331).

On January 24, 1967, Plasterers commenced picketing at the jobsite to force Texas State to assign the disputed work to employees whom it represented (A. 6–7; 31–33, 54–55, 356). All crafts working on the job honored the picket line, causing a complete work stoppage (A. 7, 31, 40, 46). The picketing ceased after the United States District Court for the Southern District of Texas, upon application of the Board's Regional Director, issued an injunction pursuant to Section 10(l) of the Act, 29 U.S.C. 160(l) (A. 7, 26–27, 356).

2. The Rainbo Bakery job

Martini entered into a contract with Rainbo Baking Company to remodel a panning room at Rainbo's bakery in Houston, Texas (A. 16; 55, 97–98, 107–108). Martini began work on March 15, 1967 (A. 16). It assigned the work, which involved the direct application of a coat of Portland cement mortar to metal lath laid over painted brick, to Tile Setters, with whom Martini had a collective bargaining agreement (A. 16–17, 20;

57–58, 127–128, 346–347, 355). On March 17, 1967, Plasterers picketed the jobsite in order to force Martini to assign the disputed work to employees whom it represented (A. 7–8; 56, 97, 356). At Rainbo's request, Martini removed its employees from the job and the picketing ceased. Thereafter, Martini returned and completed the job without further incident (A. 7–8; 56, 58, 97). Plasterers did not submit the dispute to the Joint Board (A. 17). Neither Martini nor any of the associations to which it belonged were bound by the procedures of the Joint Board (A. 8, 19; 55).

B. THE PROCEEDINGS BEFORE THE NATIONAL LABOR RELATIONS BOARD

1. The Section 10(k) proceeding

Meanwhile, Southwestern and Martini filed unfair labor practice charges with the National Labor Relations Board, alleging that Plasterers' picketing and related conduct violated Section 8(b)(4)(D) of the Act (A. 3–4). The Board's Regional Director found reasonable cause to believe that the charges had merit and, pursuant to Section 10(k) of the Act, issued a notice of hearing to determine the dispute out of which the alleged violation arose (A. 13–14). In April 1967, a hearing was held before a hearing officer of the Board, at which the competing unions and the employers involved—Southwestern, Texas State, and Martini—presented evidence and argument in support of their respective positions (A. 13–14).

On August 22, 1967, the Board issued its decision and determination of dispute. After weighing all the relevant factors presented, including the action of the Joint Board, it concluded with respect to both projects

that employees represented by Tile Setters, rather than those represented by Plasterers, were entitled to perform the work of applying to walls a coat of Portland cement mortar upon which tile was to be installed (A. 20–24).[4] The Board rejected Plasterers contention that, because the disputing unions had agreed upon a method for voluntary settlement, the agency had no authority to adjudicate the disputes; the Board applied its long standing principle that it must determine the dispute under Section 10(k) unless all the parties, including the employers assigning the work, have assented to a voluntary settlement procedure (A. 19). The Board directed Plasterers to notify the Regional Director within 10 days whether it would comply with the Board's determination of the disputes (A. 24–25).

[4] The Board considered the collective bargaining agreements among the parties; employer, area, and industry practice; relative skills and efficiency of operation; agreements between Plasterers and Tile Setters; and, as noted above, the Joint Board award (A. 20–23; 59–96, 105–106, 129, 145–146, 148–149, 165–175, 183–299, 313–314, 317–320, 347, 349–354). The Board declined to accord controlling weight to that award "[i]n view of all the circumstances, including its ambiguous nature" (A. 22; 180–181, 334, 339–343). The Board concluded (A. 23):

"Tile setters are at least as skilled in the performance of the work as plasterers, and both Texas Tile and Martini, which assigned them to the work, have been satisfied with both the quality of their work and the cost of employing them. Moreover, the instant assignments of the disputed work to tile setters are consistent with the explicit provisions of the collective-bargaining agreement between the Tile Setters and Texas Tile and Martini, are consistent with the past practice of the Employers, and are not inconsistent with area or industry practice * * *."

2. The unfair labor practice proceeding

When Plasterers refused to comply with the Board's determination of the work disputes, the General Counsel of the Board issued a complaint upon the 8(b)(4)(D) unfair labor practice charges (*supra,* p. 7), which had been held in abeyance in the hope that the 10(k) determination would obviate the need for deciding the issues raised thereby (A. 4; 357; 29 C.F.R. 102.90, 102.91, App., *infra,* pp. 37–39). The parties waived a hearing before a trial examiner and agreed to submit the matter directly to the Board. The parties further agreed to make the record in the Section 10(k) proceeding a part of the unfair labor practice proceeding. (A. 4–5; 359–360.)

Upon the entire record, the Board concluded that Plasterers had violated Section 8(b)(4)(D) of the Act by picketing the Anderson and Rainbo jobs in order to force Texas State and Martini to assign the disputed work to employees represented by Plasterers rather than employees represented by Tile Setters (A. 9–10). The Board ordered Plasterers to cease and desist from such activity, to post appropriate notices, and to notify the Regional Director what steps had been taken to comply with the order (A. 10–13). The Board again rejected Plasterers' contention that the Board was precluded from hearing and determining the dispute under Section 10(k) because the competing unions had agreed upon a voluntary method of adjustment (A. 8–9).

C. THE DECISION OF THE COURT OF APPEALS

The court below (Judges Leventhal and McGowan, with Judge MacKinnon dissenting) denied enforcement of the Board's order (A. 361–397). The court recognized that Section 10(k) commands the Board to abstain from hearing and determining a work dispute when "the parties to such dispute" have either adjusted the dispute or agreed upon a method for adjustment. It concluded, however, that "[i]t is not the employer but the rival unions (or other employee groups) who are parties to the jurisdictional dispute contesting which employees are entitled to seek the work in question" (A. 371). Accordingly, the court held that "the Board may not properly proceed to determine a jurisdictional dispute pursuant to § 10(k) when the disputing unions have agreed to settle their dispute through binding arbitration" (A. 363).[5]

SUMMARY OF ARGUMENT

The court of appeals held that the Board cannot determine a jurisdictional dispute under Section 10(k) when the competing unions, but not the employer involved, have agreed upon a voluntary method of adjustment. Section 10(k) bars the Board from making that determination if "the parties to such dispute" have voluntarily adjusted, or agreed to adjust, the dispute. Since that section was enacted in 1947, the Board, with hitherto tacit judicial approval, has

[5] Although the Rainbo Bakery dispute was not submitted to the Joint Board, the court of appeals' holding applied to that dispute, no less than to the Anderson Library dispute (which was submitted), because in both cases the two unions had agreed to be bound by the procedures of the Joint Board.

interpreted the phrase "the parties to such dispute," to include not only the competing unions but also the employer who made the work assignment. Hence, unless all three parties have "agreed upon methods for the voluntary adjustment of the dispute," the Board itself must determine the dispute under Section 10(k), irrespective of the employer's neutrality in the controversy.

A. The court below primarily relied on the premise that the "dispute" referred to in Section 10(k) is the jurisdictional dispute over the work assignment, and that the employer is necessarily a neutral party in a jurisdictional dispute. Even assuming the validity of the former assumption, the court erred in failing to recognize that Texas State was a party to that dispute, for, as soon as Texas State refused to assign the work to Plasterers, the latter was as deeply involved in a jurisdictional dispute with Texas State as it was with Tile Setters. Indeed, it is contrary to economic realities to assume that an employer is necessarily a neutral party in a jurisdictional dispute. Although there are some jurisdictional disputes in which the employer may be relatively indifferent as to which group of competing employees gets the work (see *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union (CBS)*, 364 U.S. 573), there are many others in which the employer's economic interests will be directly affected by the assignment of the work. This is particularly true in the building and construction industry, where the award of the work to one group of employees rather than another may result in the substitution of one

contractor for another. See Dunlop, *Jurisdictional Problems in Construction Industry,* 40 LRRM 18, 19. In view of the employer's vital interests in the outcome of jurisdictional disputes, and in view of the fundamental assumption in our law that a party with a direct interest in a controversy is entitled to be heard in the settlement of that controversy, it is highly unlikely that Congress intended to require the Board to defer to a dispute-settlement procedure which does not include the employer who made the work assignment. Moreover, although efficiency and economy are apt to be important factors in the employer's assignment of the work, it is unlikely that a private tribunal would fully develop or give adequate weight to those factors in the absence of the employer's participation in the proceeding.

B. In any event, the "dispute" referred to in Section 10(k) is the dispute over the jurisdictional strike to which the employer is a party. Under the statutory scheme, Section 10(k) does not become operative unless the union seeking the work has directly implicated the employer in the jurisdictional controversy by exerting strike pressure against him, as provided in Section 8(b)(4)(D). Thus, the term "parties to such dispute" encompasses not only the competing unions, but also the employer, who by then has become directly involved.

C. The Board's interpretation of Section 10(k) fully comports with Congress' intent to encourage private settlement of jurisdictional disputes. If all the parties to the dispute have in fact agreed upon a method of adjustment, the Board will not hold a Section 10(k).

hearing if one or more of the parties, including the employer, either refuses to utilize the agreed-upon method or to abide by its decision. If that decision rejects the work claim of the striking union and it nonetheless continues to strike, the General Counsel of the Board will immediately proceed on any 8(b)(4)(D) charge filed against that union. If the decision approves the work claim of the striking union and the employer refuses to assign the work to it, the General Counsel will dismiss the 8(b)(4)(D) charge, thereby leaving that union free to utilize economic pressure against the employer to secure his compliance with the award. Finally, the Board's interpretation leaves competing unions free to utilize interunion procedures, and, if as a result of such procedures one of the unions renounces its claim to the work, there will be no occasion for Board action, since by definition a jurisdictional dispute cannot exist unless there are rival claims to the work.

D. The Board's interpretation is consistent with the legislative history of Sections 8(b)(4)(D) and 10(k). The conference report cited by the court below does not address itself to the issue here. Nor is there support for the court in the quoted remarks of Senator Morse, to the effect that Section 10(k) would encourage interunion settlements of jurisdictional disputes (*infra*, pp. 32–33). There is no inconsistency between encouraging interunion settlements but denying such settlements binding effect when the employer who has a significant interest in the dispute is not a party to its resolution.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT IT IS EMPOWERED TO HEAR AND DETERMINE A JURISDICTIONAL DISPUTE UNDER SECTION 10(k) OF THE ACT UNLESS THE EMPLOYER CONTROLLING THE WORK ASSIGNMENT, AS WELL AS THE COMPETING UNIONS, HAVE AGREED UPON A VOLUNTARY METHOD OF ADJUSTMENT

INTRODUCTION

Section 8(b)(4)(D) of the National Labor Relations Act makes it an unfair labor practice for a labor organization to exert strike pressure for the purpose of forcing "any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class * * *." Unlike the statutory procedure governing other unfair labor practice charges—where an unfair labor practice proceeding is immediately instituted upon the filing of a meritorious charge (Section 10(b), 29 U.S.C. 160(b))—the Act suspends further Board proceedings on the Section 8(b)(4)(D) charge to permit a resolution of the jurisdictional dispute which gave rise to the unfair labor practice charge. Section 10(k) provides that—

> the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of the dispute. * * *

It has been the Board's consistent position, since Section 10(k) was added to the Act in 1947, that the phrase "the parties to such dispute" includes not only the competing unions but also the employer who made the work assignment; and that unless all three parties—the two unions and the employer—have "agreed upon methods for the voluntary adjustment of * * * the dispute," the Board itself must determine the dispute under Section 10(k).[6]

The court below, however, held that only the competing unions are "the parties to such dispute," and that, if they have agreed to a voluntary method of adjustment, the Board has no power to determine the dispute under Section 10(k) even though the employer involved has not agreed to be bound by that voluntary method.

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[6] See, *e.g.*, *Local 231, Int'l Hod Carriers* (*Middle States Telephone Co.*), 91 NLRB 598, 604 (1950); *United Bro. of Carpenters, Local 943* (*Manhattan Construction Co.*), 96 NLRB 1045, 1048–1049 (1951); *Int'l Union of Operating Engineers, Locals 17, et al.* (*Empire State Painting Co.*), 99 NLRB 1481, 1485 (1952); *United States Assoc. of Journeymen, etc., Local 428*, 108 NLRB 186, 197–198 (1954); *Millwrights Local 1102, United Bro. of Carpenters* (*General Riggers, Inc.*), 127 NLRB 26, 29 (1960); *Int'l Union of Operating Engineers, Local 66* (*Frank P. Badolato & Son*), 135 NLRB 1392, 1395–1396 (1962); *Newspaper & Mail Deliverers' Union of New York* (*News Syndicate Co.*), 141 NLRB 578, 580 (1963); *Operative Plasterers Int'l Assoc.* (*Twin City Tile & Marble Co.*), 152 NLRB 1609, 1611, 1615 (1965); *Int'l Union of Operating Engineers, Local 49* (*Egan-McKay Electrical Contractors, Inc.*), 164 NLRB 672, 673 (1967). *Lodge 68 of the Int'l Assoc. of Machinists* (*Moore Drydock Co.*), 81 NLRB 1108, 1113–1114, 1126–1128 (1949); *Int'l Longshoremen's Union, Local No. 16* (*Juneau Spruce Corp.*), 82 NLRB 650, 655–656 (1949).

The Board's interpretation—which heretofore has tacitly been accepted by the courts of appeals[7]—is sound because (1) it accords with economic reality in its recognition of the vital interest of employers in the resolution of many jurisdictional disputes, (2) it harmonizes Section 10(k) with the companion Section 8(b)(4)(D), (3) it comports with Congress' intent to encourage private settlement of jurisdictional disputes, and (4) it is consistent with the legislative history of the Act.

A. TREATING THE EMPLOYER AS A PARTY TO THE DISPUTE FOR PURPOSES OF SECTION 10(k) ACCORDS WITH ECONOMIC REALITIES

The court below construed the term "such dispute" in Section 10(k) as referring to the underlying jurisdictional dispute as to which union is entitled to the work assignment in question. In concluding that only the competing unions were parties to the "dispute," the court below relied primarily on the ground that the employer in a jurisdictional dispute is a "neutral * * * caught in the crossfire between the disputing unions and unable to satisfy either," and that the "purpose of protecting the neutral employer is fully served by any binding settlement between the disputing employee groups"; he "cares not how the

[7] See *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 326 F. 2d 213, 216 (C.A. 3); *Local 450, Int'l Union of Operating Engineers* v. *Elliott*, 256 F. 2d 630, 635–636 (C.A. 5); *New Orleans Typographical Union No. 17* v. *National Labor Relations Board*, 368 F. 2d 755, 763 (C.A. 5). See also *Quinn* v. *National Labor Relations Board*, 61 LRRM 2690, 2692 (C.A. D.C.), March 29, 1966, concurring opinion of Chief Judge Bazelon.

dispute is decided but wants merely that it be decided" (A. 375),[8]

Even if the court were correct in its assumption that the term "such dispute" refers only to the underlying jurisdictional dispute, (and we show, *infra*, pp. 26–27, that this assumption is incorrect), the court erred in concluding that the employer was not a party to that dispute. To begin with, it was Texas State's refusal to follow the Joint Board award and its subsequent assignment of the work to Tile Setters which induced Plasterers to make further attempts to obtain the work, and, ultimately, to picket. See *supra*, p. 6. As soon as Texas State refused to assign the work to Plasterers, it obviously became a party to the jurisdictional dispute out of which the jurisdictional strike later arose; indeed, at that point Plasterers was as deeply involved in a jurisdictional dispute with Texas State as it was with Tile Setters. As several courts of appeals have recognized, although Section 8(b)(4)(D) and its counterpart Section 303(a)(4) of the Labor Management Relations Act, 29 U.S.C. 187(a)[9] "are of particular aid in disputes involving two rival unions within an employer organization, it is clear

[8] The court also derived support for its view from the failure of Congress expressly to name the employer as a necessary party to a 10(k) proceeding (A. 371). But any inference to be drawn from this circumstance is offset by the fact that Congress could have written the section so as expressly to limit the necessary parties to the rival labor groups involved. It adopted neither course, but instead, used the general language "parties to such dispute."

[9] This provision, now Section 303(a), makes it unlawful "for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 8(b)(4) of * * * [the National Labor Relations Act, as amended]," and gives any

that these sections are also applicable when the dispute might be said to be solely between an employer and a union." *Local 978, United Bro. of Carpenters* v. *Markwell,* 305 F. 2d 38, 47 (C.A. 8); *National Labor Relations Board* v. *Local 25, Int'l Bro. of Electrical Workers* (*Sarrow-Suburban Electric Co.*), 383 F. 2d 449, 454 (C.A. 2).

Furthermore, the notion that an employer is necessarily a neutral party in a jurisdictional dispute is contrary to economic realities, particularly in the building and construction industry. There are, to be sure, some jurisdictional disputes in which the employer may be relatively indifferent as to which group of competing employees performs the work. This was the situation, for example, in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union* (*CBS*), 364 U.S. 573, relied on by the court below (A. 374–375),[10] where the employer, employing both technicians and stage hands, was neutral as to which group performed the lighting work in dispute. This doubtless explains the Court's characterization of a jurisdictional dispute

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person injured by reason of such violation the right to sue for damages in the Federal district court (Section 303(b)). See *Int'l Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237.

[10] The Court in *CBS* was not concerned with the issue presented in this case, but merely with whether the Board, when it concededly had jurisdiction under Section 10(k), was required to decide the jurisdictional dispute on its merits, taking into account all relevant criteria, or was limited to determining whether one union was entitled to the work by virtue of an outstanding Board certification or contract. The Court held that the Board had the former duty, which it fully discharged here (see n. 4, *supra*).

as "a quarrel between two groups [of employees] which, here as in most instances, is of so little interest to the employer that he seems perfectly willing to assign work to either if the other will just let him alone." Id., at 579. But cf. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263: "We have here a so-called 'jurisdictional' dispute involving two unions and the employer."

But there are many disputes in which the employer's economic interests will be directly affected by the assignment of the work and in no meaningful sense can it be said that he is a neutral in the dispute or indifferent to its resolution. A change in the assignment of the work may result, for example, in different terms or conditions of employment, replacement of employees with outsiders, higher wages or costs, or even the displacement of the employer himself (see A. 94–96, 144, 182).[11] In the instant case, for example, neither Texas State nor Martini has an agreement with Plasterers but both had a contract with the Tile Setters governing the work in dispute; an award of the work to Plasterers would have required these contractors either to hire a new complement of employees represented by Plasterers or to give up their subcontract.

In view of the vital interest that the employer may have in the outcome of a jurisdictional dispute, it is highly unlikely that Congress designed a structure for settling these disputes that would bind the em-

[11] See also Comment, *The Employer as a Necessary Party to Voluntary Settlement of Work Assignment Disputes Under Section 10(k) of the NLRA*, 38 U. of Chi. L. Rev. 389, 400–401 (1971).

ployer to a settlement to which he was not a party and in which he had no voice. Indeed, the notion that a party with a direct interest in a controversy (particularly one whose outcome will require specific action by him) is entitled to be heard in the settlement of that controversy is basic to our concept of fair procedure, and is reflected, for example, in our procedural rules dealing with multiparty jurisdiction, especially the rules of intervention (F.R.Civ.P., Rule 24), and in the law of res judicata. See generally, *Developments in the Law—Multiparty Litigation in the Federal Courts,* 71 Harv. L. Rev. 874 (1958). The presumption in favor of giving the right to be heard to all parties with a direct interest in a controversy is so strong that a statute should not be construed to deny that right without strong evidence that Congress intended such a result. No such evidence exists here, either in the language of Section 10(k) or in the legislative history of that Section, which as we show (*infra,* pp. 31–33) does not address the issue in this case.

Indeed, the fact that the National Joint Board includes employer groups in its structure,[12] and operates

[12] The Joint Board was created by an agreement—effective May 1, 1948—between the Building and Construction Trades Department, AFL–CIO, and the Associated General Contractors of America and several speciality contractors' associations. Dunlop, *Jurisdictional Disputes*, New York University, Second Annual Conference on Labor (1949), 496; Amicus Br. of Laborers' Int'l Union in Support of the Petitions for Certiorari, 1a–7a. Since its inception, the Plan has required that the Joint Board consist of an equal number of representatives of employers and unions, and an impartial chairman. Plan for National Joint Board for Settlement of Jurisdictional Disputes (hereafter "plan") Article II, Sec. 1, Amicus Br. for Laborers' Int'l Union, 4a.

under the explicit principle that an employer is not bound by its procedures unless he has specifically so agreed,[13] is a dramatic acknowledgement by the member unions of the importance of the employers' full participation in the dispute settlement processes as well as their vital interest in the outcome of the Joint Board's decision. As John Dunlop, the first chairman of the Joint Board, stated: "The National Joint Board has demonstrated that both contractors and unions have a genuine common interest in jurisdictional issues, and both have a vital contribution to make to their orderly settlement." Dunlop, *Jurisdictional Problems in Construction Industry*, 40 LRRM 18, 19. He also explained:

> The fact that some unions work exclusively, as a matter of policy or custom, for particular contractors tends to convert competition among contractors also into jurisdictional disputes between unions. If a contractor is to hire such a craft he must also hire a subcontractor. More accurately, the dispute is between a contractor

[13] Article V, Sec. 5 of the original Plan, and Article III, Sec. 7 of the provisions in effect at the time of the instant dispute contain the following language (Amicus Br. for Laborers' Int'l Union, *op. cit.*, 7):

"It is understood only those contractors who employ members of the organizations affiliated with the Building and Construction Trades Department of the AFL–CIO, shall be considered as bound by this agreement when they have signed a stipulation setting forth that they are willing to subscribe to and be bound by the terms and provisions of this agreement."

The procedural rules of the Joint Board add (A. 343–344):

"These procedures shall apply to:

(a) Contractors who employ members of the organizations affiliated with the Building and Construction Trades Department, AFL–CIO, and who have signed a stipulation setting forth that they are willing to be bound by the terms of the

and a union on one side against another contractor and union on the other side [Dunlop, *op. cit.*, n. 12, *supra*, at 486].[14]

The court below found "persuasive evidence" for its interpretation in the "fact that the employer is not bound by a 10(k) determination of the Board" (A. 371). But this fact does not lessen the employer's direct interest in the resolution of the dispute or relegate him to the status of a disinterested neutral "who cares not how the dispute is decided but wants

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agreement establishing the Joint Board, or who are members of a signatory association of contractors with authority to bind its members, or who are parties to a collective bargaining agreement providing for the settlement of jurisdictional disputes under the procedures herein set forth * * *."

The original Plan terminated in 1969, when the Associated General Contractors and some specialty contractor associations were unable to secure certain changes. These groups refused to become signatories to a new Joint Board Plan which went into effect on April 3, 1970. Amicus Br. on behalf of AGC, *et. al.*, in Support of the Petitions for Certiorari, 16, n. 7. The new Plan, however, continues to contain the provision requiring the employer to agree to be bound by the Plan. Plan for Settling Jurisdictional Disputes Nationally and Locally, Article III, Sec. 7.

[14] In the brief (prepared by Archibald Cox) which the Joint Board filed with the National Labor Relations Board in the *Acoustical Contractors* case, 119 NLRB 1345 (1958), discussed, *infra*, p. 28, it specificially recognized that, unless all parties, including the employer, were bound by the Joint Board, the National Labor Relations Board was empowered to hear and determine the jurisdictional dispute. The Joint Board urged that therefore the National Labor Relations Board should abandon its pre-*CBS* practice of accepting the employer's work assignment unless the striking union was entitled to the work under an outstanding Board certification or contract (see n. 10, *supra*); for that practice furnished a strong inducement to employers to drop out of the Joint Board and come to the National Labor Relations Board. Jt. Bd. Br. 27, 56, 58–60.

merely that it be decided" (A. 375).[15] Furthermore, a 10(k) determination in favor of the striking union is enforceable against the employer in the sense that it results in an administrative dismissal of the 8(b)(4)(D) charge, thereby leaving the union free to strike the unwilling employer without violating Section 8(b)(4)(D) (see *infra*, p. 28, n. 21).[16] Hence, as a practical matter, the employer is under compelling pressure to accept a 10(k) determination. See also *Local*

[15] The scheme of the Act is such that a Board 10(k) determination does not, by itself, require even the striking union to comply with it. Where the determination is adverse to that union and it nonetheless continues to exert strike pressure, the determination can be enforced against it only through a Section 8(b)(4)(D) proceeding which culminates in an order barring the strike.

Moreover, '[i]n a Section 10(k) proceeding, the Board need only find that there is *reasonable cause to believe* that an 8(b)(4)(D) violation has occurred; in an 8(b)(4)(D) proceeding, findings are based on a *preponderance of the evidence*." *Int'l Typographical Union* (*Worcester Telegram Publishing Co.*), 125 NLRB 759, 761, n. 5 (1959). Accordingly, it is theoretically possible that the Board may even find that its 10(k) determination is not enforceable under 8(b)(4)(D).

[16] While Section 10(k) itself merely provides for dismissal of the 8(b)(4)(D) charge "[u]pon compliance by the parties to the dispute with the decision of the Board * * *," this provision must be read together with Section 8(b)(4)(D), which as shown (see n. 21, *infra*) privileges strike pressure where the "employer is failing to conform to an order * * * of the Board determining the bargaining representative for employees performing such work." Taken together, the two provisions require that the 8(b)(4)(D) charge should be dismissed not only where the striking union complies with the Board's 10(k) determination, but also where the employer declines to comply therewith.

502, Int'l Hod Carriers (Cement-Work, Inc.), 140 NLRB 694 (1963).[17]

Finally, from the employer's standpoint, efficiency and economy are likely to be important factors in determining whether work is assigned to one group of employees rather than to another. The Board, "to which is entrusted the protection of the public interest in this area," takes these factors, as well as others, into account "in reaching its determination as to assignment of work." *National Labor Relations Board* v. *Local 25, Int'l Bro. of Electrical Workers (New York Telephone Co.)*, 396 F. 2d 591, 594 (C.A. 2). It did so here (*supra*, p. 8, n. 4). But without the participation of the employer who made the work assignment, it is unlikely that a private tribunal, such as the Joint Board, would fully develop and give adequate weight to the considerations of economy and efficiency supporting the employer's action.[18] Thus, in

[17] Plasterers contend (Br. in Opp. 13, n. 12) that the secondary boycott provisions of the Act preclude a union from taking effective economic action against a primary employer in the building and construction industry. The union, however, may picket the primary employer at the construction site so long as its picketing conforms to the *Moore Drydock* criteria, 92 NLRB 547, 549 (1950); and, while these criteria are designed to minimize the inevitable impact of the picketing on the neutral employers sharing the work site, they nevertheless afford the union full freedom to appeal to the primary employer, his employees, and his suppliers. See *United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492, 499.

[18] In *Int'l Assoc. of Machinists (J. A. Jones Constr. Co.)*, 135 NLRB 1402 (1962), the Board, in response to this Court's decision in *CBS*, n. 10, *supra*, announced that henceforth in making determinations under Section 10(k) it would consider "all relevant factors, e.g., the skills and work involved, certifi-

the present case the Joint Board awarded the disputed work to the Plasterers solely on the basis of a 1917 agreement between the competing International Unions and a 1924 decision interpreting that agreement (A. 316, 341–342), notwithstanding that the dispute involved a method of applying tile which was developed in mid-1950 (A. 18–19, 110, 363).[19] We do not believe that Congress intended to restrict the Board's 10(k) jurisdiction and relegate the determination of a jurisdictional dispute to a procedure in

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cations by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL–CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. * * *" (Pp. 1410–1411.)

[19] The Joint Board gave recognition to "the interest of efficient job operation" only to the extent of permitting tile setters to apply plaster materials where "the tile to be adhered to the coat of plaster material applied to the initial scratch coat [or] directly to clay or cement block walls is set during the same work day in which such coat is applied" (A. 342).

The Joint Board procedures provide that, in making a job decision, the Joint Board shall utilize the following criteria: "Decisions and agreements of record as set forth in the Green Book, valid agreements between affected International Unions attested by the Chairman of the Joint Board, established trade practice and prevailing practice in the locality." They further provide that the Joint Board "should not ignore the interests of the consumer in settling jurisdictional disputes but should give due regard to such factors as efficiency and economy of operation." (A. 344–345.)

As the Second Circuit has stated, the Joint Board "gives little weight to considerations of economy and efficiency, and * * * past practice is usually held determinative." *National Labor Relations Board* v. *Local 25, Int'l Bro. of Electrical Workers*, *supra*, 396 F. 2d at 594. See also Comment, *op. cit.*, n. 11, *supra*, 38 U. of Chi. L. Rev. at 401–402.

which there is no assurance that all the relevant considerations will be adequately presented.

B. THE DISPUTE REFERRED TO IN SECTION 10(k) IS THE JURISDICTIONAL STRIKE, TO WHICH THE EMPLOYER IS A PARTY

Even if the employer were not a party to the jurisdictional dispute over work assignments, the Board still could make a Section 10(k) determination because the "dispute" referred to in Section 10(k) is not the jurisdictional dispute, but rather the dispute over the jurisdictional strike, to which the employer is obviously a party. As noted, under the statutory scheme, the provisions of Section 10(k) do not come into play until a labor organization strikes, or threatens to strike, for the purpose of forcing an employer to assign particular work to that union rather than to another union or group of employees. Thus, as Judge McKinnon pointed out in dissent (A. 393, emphasis in original), the "words 'such dispute' in Section 10(k) *refer to the dispute out of which the unfair labor practice arose,*" and, under Section 8(b)(4)(D), that is the jurisdictional *strike* in which the striking union attempts to force the "employer to assign particular work to employees * * * [in its union]." Since both the employer and the striking union are parties to the jurisdictional strike, the Board is empowered to proceed under Section 10(k) if the employer has not participated in the voluntary settlement process. The contrary conclusion of the court below, which construed the term "such dispute" in Section 10(k) as referring to the underlying jurisdictional dispute, ignores the fact that, under the statutory scheme,

Section 10(k) does not become operative unless the union seeking the work has implicated the employer in the jurisdictional controversy by exerting strike pressure against him.[20] See *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 263–264.

C. THE BOARD'S CONSTRUCTION OF SECTION 10(k) ACCORDS WITH CONGRESS' OBJECTIVE OF ENCOURAGING PRIVATE SETTLEMENT OF JURISDICTIONAL DISPUTES

The Board's view that the employer is a necessary party to a voluntary method of adjustment for purposes of Section 10(k) comports with Congress' intent to encourage private settlement of jurisdictional disputes. Although the Board does not require the employer to accept such a procedure unless he has so agreed, the Board does not permit the employer, or any other party, to ignore such an agreement.

If all the parties to the dispute have in fact agreed upon a method of adjustment, the Board will not hold a Section 10(k) hearing if one or more of the parties, including the employer, either refuses to utilize the agreed-upon method or to abide by its decision. Similarly, if that decision rejects the work claim of the striking union and it nonetheless continues to strike, the General Counsel of the Board will immediately proceed on any 8(b)(4)(D) unfair labor practice charge filed against that union. See *Int'l Bro. of Teamsters, Local No. 236 (Wm. F. Trayler)*, 97 NLRB 1003, 1006–1007 (1952); *Local Union No. 9,*

[20] During fiscal year 1969, an employer was the charging party with respect to 535 of the 579 charges which were filed under Section 8(b)(4)(D). *Thirty-fourth Annual Report of the National Labor Relations Board* (1969), 197.

Wood, Wire and Metal Lathers Union (A. W. Lee, Inc.), 113 NLRB 947, 953–954 (1955); *Wood, Wire and Metal Lathers Union, Local No. 2 (Acoustical Contractors Assoc. of Cleveland)*, 119 NLRB 1345, 1350–1355 (1958); *National Labor Relations Board* v. *Local 825, Int'l Union of Operating Engineers*, 410 F. 2d 5, 8–9 (C.A. 3), reversed on other grounds, 400 U.S. 297; 29 C.F.R. 102.93, App., *infra*, pp. 39–40. On the other hand, if the arbitrator's decision approves the work claim of the striking union and the employer refuses to assign the disputed work to it, the General Counsel will dismiss the 8(b)(4)(D) charge filed against that union, thereby leaving the union free to utilize economic pressure against the employer to secure his compliance with the award.[21] Parties who agree to a voluntary method of settling jurisdictional disputes are thus under strong practical pressure to accept the determination of the tribunal they have selected.

The reliance of the Court below on *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, and the "general principle that full scope should be given to voluntary arbitration procedures" (A. 381) is misplaced. Nothing in the Board's decision here precludes the Joint Board,

[21]By its terms, Section 8(b)(4)(D) exempts economic pressure where the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." Since the decision in *CBS*, n. 10, *supra*, the General Counsel has viewed a Board 10(k) award as an "order" within the meaning of the exemption to Section 8(b)(4)(D). He would give equivalent effect to a jurisdictional award by a private tribunal to which all of the parties have bound themselves. (See 29 C.F.R. 102.91, 102.93, App. *infra*, pp. 39–40.)

even though it has jurisdiction only over the two unions, from attempting to resolve the jurisdictional dispute; and if, as a result of its efforts the striking union relinquishes its claim to the work, there will be no occasion for Board action. In *Carey*, however, the Court specifically recognized that, if the arbitrator does not have jurisdiction over all the parties, the policy favoring arbitration does not preclude the National Labor Relations Board from redetermining the matter. The Court held in *Carey* that it was not incompatible with the National Labor Relations Act for one union to compel the employer to arbitrate a jurisdictional dispute even though the competing union was not a party to the arbitration proceeding. The Court stated, however, that, "[s]hould the Board disagree with the arbiter * * *, the Board's ruling would, of course take precedence * * *. The superior authority of the Board may be invoked at any time." 375 U.S. at 272.[22]

Nor can it properly be asserted, as was contended before the Board changed its policy in response to this Court's decision in *CBS, supra* p. 18, that the criteria utilized by the Board in determining jurisdictional disputes unduly encourage the employer, or the union which has been assigned the work, to prefer a Board determination of the dispute to a private method of adjustment. As shown (p. 24, n. 18), the Board

[22] The National Labor Relations Board gives strong consideration to decisions of the Joint Board and to agreements between International Unions. See *Local 68, Wood, Wire & Metal Lathers Int'l Union (Acoustics & Specialties, Inc.)*, 142 NLRB 1073, 1079 (1963); *Sheet Metal Workers Int'l Ass'n, Local 162 (Lusterlite Corp.)*, 151 NLRB 195, 202 (1965); *Millwrights Local Union No. 1102 (Don Cartage Co.)*, 160 NLRB 1061, 1080 (1966).

makes its determination after considering all of the relevant factors. If a private method of adjustment, like the Joint Board, were to utilize the same criteria, and clearly to indicate that it did so in arriving at its ultimate determination, there is no reason to believe that any of the parties would be prompted to choose the National Labor Relations Board over the private procedure.[23]

[23] The court below also found support for its position that the employer is not a necessary party to the resolution of a jurisdictional dispute in the Board's *Safeway* doctrine (A. 383–384). In *Safeway* and other similar cases (*Highway Truckdrivers, Local 107* [*Safeway Stores, Inc.*], 134 NLRB 1320 (1961); *Local 1905, Carpet Linoleum Layers (Butcher and Sweeney Constr. Co.)*, 143 NLRB 251 (1963)), the Board has dismissed 10(k) proceedings upon finding that either the union originally seeking the work, or the one performing it, has renounced any claim thereto. However, these decisions rest on the theory that the Board has power, under Section 10(k), only to hear and determine the merits of a jurisdictional dispute and that, by definition, such a dispute cannot exist unless there are rival claims to the work. That condition was met here for, notwithstanding the Joint Board determination, both the Tile Setters and the Plasterers continued to claim the work in question (A. 51–55, 180–181, 307, 331). See also *National Labor Relations Board* v. *Local 25, Int'l. Bro. of Electrical Workers*, *supra*, 383 F. 2d at 454.

We believe that the court below was overly optimistic in asserting that "the availability of a binding agreement between the disputing unions creates means of enforcing a permanent resolution of the jurisdictional dispute not otherwise available to the Board" (A. 381–382). Where the employer has not agreed to be bound by a Joint Board decision, a union which gets an award in its favor may be able to obtain, in a suit under Section 301 of the Labor-Management Relations Act (29 U.S.C. 185), an order compelling the losing union to abandon its claim to the work in dispute. But such an order does not necessarily require the employer to assign the work to the winning union.

D. THE BOARD'S INTERPRETATION IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF SECTIONS 8(b)(4)(D) AND 10(k)

The court of appeals (A. 375–378) placed considerable emphasis on the legislative history of Section 10(k). In support of its interpretation, the court cited only a reference in the House Conference Report to jurisdictional disputes as "disputes between unions" and a number of comments by Senator Morse, who submitted the original proposal for what later became, with considerable deletions, Section 10(k), to the effect that the enactment of that provision would encourage unions to settle their own jurisdictional disputes.

The debates and committee reports, however, do not discuss what Congress meant by the term "parties to such dispute" in Section 10(k). As Judge MacKinnon pointed out in dissent, "there is a very good reason" why the "members of Congress just did not address themselves to the point" (A. 391):

> The bill originated in the House and at that stage it merely defined jurisdictional strikes and made them unlawful * * *. This treatment of jurisdictional strikes was supplanted in the Senate bill by a section 10(k) the principal provision of which empowered and authorized the NLRB to appoint an arbitrator to hear and determine such disputes. This provision for the NLRB appointment of an arbitrator was removed in the Conference Committee and section 10(k) then for the first time assumed its present character * * *. While the 10-day provision was always a part of 10(k) from the time it emerged in the Senate bill it attracted

no notice because it was always overshadowed by the provision for the Board to appoint an arbitrator.[24]

The passage from the House Conference Report, on which the court of appeals relied (A. 377–378; H. Rep. No. 510, 80th Cong., 1st Sess., 57, 1 Leg. Hist.[25] (1947) 561), does not support its conclusion. Although the language the court emphasized states that Section 10(k) would empower the Board to hear and determine "disputes between unions," this statement is followed by the phrase "giving rise to unfair labor practices under section 8(b)(4)(D) (jurisdictional strikes)." Since a jurisdictional strike necessarily implicates the employer, the passage as a whole is equally consistent with the Board's view that, by the time a jurisdictional dispute is ripe for Board determination under Section 10(k), there are three parties—the two unions and the employer who is being pressured to change his work assignment.[26]

Furthermore, the expressed hope of Senator Morse

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[24] The legislative history is detailed in *National Labor Relations Board* v. *Radio and Television Broadcast Engineers Union* (*CBS*), *supra*, 364 U.S. at 581–582.

[25] "Leg. Hist. (1947)" refers to the two volume legislative history of the Labor-Management Relations Act, 1947 (G.P.O. 1948).

[26] Similarly, the other definitional remarks in the legislative history which describe a jurisdictional dispute as a controversy between two or more unions (see, *e.g.*, 93 Cong. Rec. 1824, 2 Leg. Hist. (1947) 951 (Senator Morse)) merely reflect the fact that such a dispute usually focuses on interunion controversy. These observations certainly do not compel the inference that Congress intended that the employer not be heard on the merits of the dispute, particularly where it has resulted in a strike against him.

(who proposed the arbitration provision which was ultimately deleted) that Section 10(k) would encourage unions to set up machinery for the settlement of jurisdictional disputes within their own ranks (A. 377; 93 Cong. Rec. 1845, 2 Leg. Hist. (1947) 983) does not support the court of appeals' interpretation. There is no inconsistency between encouraging inter-union settlements, but denying such settlements binding effect when the employer who has a significant interest in the dispute is not a party to its resolution. Moreover, in the statement which the court below cited, Senator Morse specifically referred to union machinery "settling such disputes *short of economic action*" (*ibid.*, emphasis added). In other words, he expressed the belief that, with the prospect looming of governmental resolution of the dispute under Section 10(k), the unions would in most cases resolve the dispute among themselves *without* embroiling the employer through coercive economic action; his comments do not indicate that, once such action is utilized, the unions could, under Section 10(k), settle the dispute solely between themselves without the employer's participation.

In sum, the Board's conclusion that the phrase "parties to such dispute" in Section 10(k) includes not only the competing unions, but the employer who made the work assignment, is a reasonable interpretation of the Act and is consistent with its purposes. Moreover, the Board's interpretation is entitled to special weight, since it was adopted shortly after Section 10(k) was enacted and has consistently been adhered to for more than 20 years. See *National Labor Relations Board* v.

Coca-Cola Bottling Co., 350 U.S. 264, 269; *Udall* v. *Tallman*, 380 U.S. 1, 16–17; *Griggs* v. *Duke Power Co.*, No. 124, 1970 Term, 39 U.S.L.W. 4317, 4320, March 8, 1971.[27] The Board's interpretation should thus have been accepted by the court below.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be

[27] Since 1949, this interpretation was set forth in several annual reports which the Board submitted to Congress. See, e.g., *Fourteenth Annual Report of the National Labor Relations Board* (G.P.O., 1949), 99–102; *Seventeenth Annual Report of the National Labor Relations Board* (G.P.O., 1952), 195–196; *Twentieth Annual Report of the National Labor Relations Board* (G.P.O., 1955), 117–118; *Twenty-first Annual Report of the National Labor Relations Board* (G.P.O., 1957), 119; *Twenty-third Annual Report of the National Labor Relations Board* (G.P.O., 1958), 101–102. Yet, in 1959, when Congress enacted extensive revisions to the Act—including an amendment to Section 8(b)(4)—no change was made in either the procedural or substantive provisions respecting jurisdictional disputes. See *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366.

remanded to that court with directions to consider the Board's decision on the merits.

Respectfully submitted.

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MAY 1971.

APPENDIX

The relevant provisions of the National Labor Relations Board rules and regulations (29 CFR. 102.1, *et. seq.*) are as follows:

SUBPART F—PROCEDURE TO HEAR AND DETERMINE DISPUTES UNDER SECTION 10(k) OF THE ACT

SEC. 102.89 *Initiation of proceedings.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) of the act, the regional director of the office in which such charge is filed or to which it is referred shall, as soon as possible after the charge has been filed, serve on the parties a copy of the charge together with a notice of the filing of the charge and shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the act, he shall give it priority over all other cases in the office except other cases under section 10(l) and cases of like character.

SEC. 102.90 *Notice of filing of charge; notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.*—If it appears to the regional director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the regional director that they have adjusted, or have agreed upon methods for the voluntary adjustment of the dispute out of which such unfair labor practice shall have arisen, he shall cause to be served on all parties to such dispute a notice of hearing under section 10(k) of the act before a hearing

officer at a time and place fixed therein which shall be not less than 10 days after service of the notice of the filing of said charge. The notice of hearing shall contain a simple statement of the issues involved in such dispute. Such notice shall be issued promptly, and, in cases in which it is deemed appropriate to seek injunctive relief pursuant to section 10(l) of the act, shall normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings shall be conducted by a hearing officer, and the procedure shall conform, insofar as applicable, to the procedure set forth in sections 102.64 to 102.68, inclusive. Upon the close of the hearing, the proceeding shall be transferred to the Board and the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. Should any party desire to file a brief with the Board, eight copies thereof shall be filed with the Board at Washington, D.C., within 7 days after the close of the hearing: *Provided, however,* That, in cases involving the national defense and so designated in the notice of hearing, no briefs shall be filed, and the parties, after the close of the evidence, may argue orally upon the record their respective contentions and positions: *Provided further,* That, in cases involving the national defense, upon application for leave to file briefs expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may for good cause shown grant such leave and thereupon specify the time for filing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Requests for extension of time in

which to file a brief under authority of this section shall be in writing and received by the Board in Washington, D.C., 3 days prior to the due date with copies thereof served on the other parties. No reply brief may be filed except upon special leave of the Board.

SEC. 102.91 *Compliance with determination; further proceedings.*—If, after issuance of the determination by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the determination, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director shall proceed with the charge under paragraph (4)(D) of section 8(b) and section 10 of the act and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern. *Provided, however,* that if the Board determination is that employees represented by a charged union are entitled to perform the work in dispute the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

SEC. 102.92 *Review of determination.*—The record of the proceeding under section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10 (e) and (f) of the act.

SEC. 102.93 *Alternative procedure.*—If either before or after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw

the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of section 8(b)(4)(D) of the act is occurring or has occurred, he may issue a complaint under section 102.15, and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and sections 102.90 to 102.92, inclusive, are inapplicable. Provided, however, that if an agreed-upon method of voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

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